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Righting the Wrong of *Woytus*: A Proposal for Adoption of a Rule in Missouri Creating a New Category of Depositions Which May be Used for Discovery Purposes Only

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In *State ex rel. Woytus v. Ryan*,¹ the Missouri Supreme Court ruled that plaintiffs in personal injury cases may not be compelled to execute authorizations granting defense counsel permission to conduct *ex parte* interviews of the plaintiff's treating physicians. In so ruling, the court expressed a desire to strike a balance between the interest of personal injury plaintiffs in preserving the physician/patient privilege and the interest of personal injury defendants in obtaining full and fair disclosure of relevant information through discovery. A closer look, however, at the practical effects of the court's decision discloses that the ruling puts defense counsel at a serious disadvantage in preparing personal injury cases for trial. A new rule permitting depositions which may be used for discovery purposes only is needed to ameliorate the harsh effect of the decision.

I. BACKGROUND

The question of whether a court may compel execution of authorizations granting defense counsel permission to conduct *ex parte* interviews of the plaintiff's treating physicians was first addressed in Missouri in the case of *State ex rel. Stufflebam v. Appelquist*.² In *Stufflebam*, the Missouri Court of Appeals, Southern District, held that the defendant in a personal injury action may obtain a court order compelling the plaintiff to execute authorizations for release of medical records which include a provision granting defense counsel

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1. 776 S.W.2d 389 (Mo. 1989) (en banc).

2. 694 S.W.2d 882 (Mo. Ct. App. 1985), *overruled*, *State ex rel. Woytus v. Ryan*, 776 S.W.2d 389 (Mo. 1989) (en banc).

permission to interview the plaintiff's treating physicians.³ In so ruling, the *Stufflebam* court chose to follow the rationale of several other court decisions upholding such orders on the grounds that *ex parte* interviews are an effective and cost efficient method of informal discovery which facilitates early settlement and eliminates non-essential witnesses at trial.⁴ The *Stufflebam* court reasoned that no party has a proprietary right to any witness' testimony, unless the information is privileged, since either party may proceed by any lawful manner to discover what a witness knows,⁵ and that the physician/patient privilege is waived by the filing of a personal injury suit to the extent the information sought is relevant to issues raised by the pleadings.⁶

The *Stufflebam* court rejected an argument by the plaintiff that *ex parte* interviews are subject to abuse by defense counsel and threaten the integrity of the physician/patient relationship. The court found nothing in the record to support such an argument and concluded that for it to assume such abuse by attorneys and physicians would "denigrate the integrity of their respective professions."⁷

Stufflebam was overruled by the Missouri Supreme Court in *State ex rel Woytus v. Ryan*.⁸ In *Woytus*, the trial court, acting under the authority of *Stufflebam*, entered an order compelling the plaintiff to execute authorizations for release of medical records which included a provision authorizing *ex parte* interviews of the plaintiff's treating physicians.⁹ The plaintiff, who had designated her treating physicians as expert witnesses, filed a petition for writ of prohibition in the Missouri Court of Appeals on the grounds that Rule 56.01(b)(4) of the Missouri Rules of Civil Procedure does not provide for discovery of expert witness testimony by *ex parte* interview and that the only proper methods of discovering expert witness testimony are interrogatories and depositions.¹⁰ The court of appeals agreed in large part and entered an order

3. *Id.* at 888.

4. *Id.* See *Doe v. Eli Lilly & Co., Inc.*, 99 F.R.D. 126 (D. D.C. 1983); *Langdon v. Champion*, 745 P.2d 1371 (Alaska 1987) (citing *Arctic Motor Freight, Inc. v. Stover*, 571 P.2d 1006 (Alaska 1977)); *Trans-World Investments v. Drobney*, 554 P.2d 1148 (Alaska 1976); *Green v. Bloodsworth*, 501 A.2d 1257 (Del. Super. Ct. 1985); *Stempler v. Speidell*, 100 N.J. 368, 495 A.2d 857 (1985). See also *Coralluzzo v. Fass*, 450 So.2d 858 (Fla. 1984); *Orr v. Sievert*, 292 S.E.2d 548 (Ga. Ct. App. 1982).

5. *Stufflebam*, 694 S.W.2d at 888 (quoting *Doe v. Eli Lilly & Co., Inc.*, 99 F.R.D. 126, 128 (D. D.C. 1983)).

6. *Id.* at 885.

7. *Id.* at 888.

8. 776 S.W.2d 389, 395 (Mo. 1989) (en banc).

9. *Id.* at 390-91.

10. *Id.* at 391.

of prohibition enjoining the trial court from enforcing its order compelling plaintiff to execute the authorizations.¹¹ The court, however, did not ban *ex parte* interviews by defense counsel altogether. Instead, the Court ruled that while opinions developed by the physician as an expert witness are subject to the discovery limitations of Rule 56.01(b)(4), information relating to the physician's diagnosis and treatment of the plaintiff prior to the physician being retained as an expert are subject to discovery by *ex parte* interview.¹²

The Missouri Supreme Court accepted transfer of the *Woytus* case and reversed the trial court's order in all respects, expressly overruling *Stufflebam* in the process.¹³ The Supreme Court ruled that *ex parte* interviews of the plaintiff's treating physicians by defense counsel posed a risk to the physician/patient privilege which outweighed any benefit that might be gained by permitting them.¹⁴ The Supreme Court rejected arguments by the defendant that *ex parte* interviews would conserve medical resources¹⁵ and facilitate early settlement.¹⁶ The court also held that protective orders and in limine relief would not provide adequate protection against potential abuses of the physician/patient privilege.¹⁷ Consequently, personal injury plaintiffs may no longer be compelled to execute authorizations for release of medical records granting defense counsel permission to conduct *ex parte* interviews of the plaintiff's treating physicians.

II. THE PROBLEM PRESENTED BY *WOYTUS*

Woytus places defendants in personal injury cases at a distinct disadvantage in preparing the medical aspects of the case for trial by depriving defense counsel of their most effective means of determining the substance of a medical witness's testimony in advance of trial. Although the defendant may obtain discovery of the plaintiff's treating physicians by deposition pursuant to Rule 54.03(b)(4), this is not an adequate substitute for the *ex parte*

11. *Woytus v. Ryan*, No. 54752, slip op. at 6-7, 10 (Mo. Ct. App. September 13, 1988).

12. *Id.* at 7. Other courts which have examined this issue agree that facts and opinions developed by an expert prior to being endorsed as an expert are not subject to discovery limitations relating to expert testimony. *See, e.g., Barkwell v. Sturm Ruger Co.*, 79 F.R.D. 444, 446 (D. Alaska 1978); *Sullivan v. Sturm, Ruger & Co.*, 80 F.R.D. 489, 490-91 (D. Mont. 1978); *Nelco Corp. v. Slater Elec., Inc.*, 80 F.R.D. 411, 414 (E.D.N.Y. 1978).

13. *Woytus*, 776 S.W.2d at 395.

14. *Id.* at 394.

15. *Id.*

16. *Id.* at 394-95.

17. *Id.*

interview since, under the present rules of Civil Procedure, there is nothing to prevent plaintiff's counsel from qualifying the witness on cross-examination and using the deposition to preserve the witness's testimony for trial, thus depriving defense counsel of his only opportunity to evaluate the witness's testimony and prepare for cross-examination in advance of the testimony being preserved for trial.

Plaintiff's counsel would have several reasons for preserving a treating physician's trial testimony in a deposition noticed by defense counsel for discovery purposes rather than calling the witness at trial or noticing a separate deposition. These include: (1) not having to pay the witness's professional fee; (2) gaining the advantage of developing the witness's testimony by leading questions; and (3) forcing defense counsel to cross-examine the witness without the benefit of advance preparation.¹⁸

Faced with the prospect of plaintiff's counsel developing the witness's trial testimony on cross-examination, defense counsel may choose not to depose the physician in advance of trial. When that happens, defense counsel is deprived of his most effective means of making an informed decision on whether to call the physician to testify at trial (either live or by deposition) and preparing an effective cross-examination if the physician is called to testify by the plaintiff. Counsel for the plaintiff, on the other hand, whose ability to conduct *ex parte* interviews of his client's treating physicians is unaffected by *Woytus*, continues to be able to conduct informal discovery of medical witnesses (except the defendant's examining physician) and to make informed decisions on these matters.

18. Where plaintiff preserves a treating physician's trial testimony in a deposition noticed by defense counsel for discovery purposes, defense counsel's cross-examination of the witness will likely be less effective than if plaintiff waits and takes a second deposition or calls the witness at trial because:

1. Defense counsel's handwritten notes, if any, from his direct examination of the physician may be too sketchy or too illegible to be used effectively to cross-examine the witness.
2. Defense counsel has not had an opportunity to organize his notes into an effective and concise cross-examination of the weakest links in the physician's testimony.
3. Defense counsel has not had an opportunity to consult with his own experts or to review authoritative treatises to identify weaknesses or inconsistencies in the physician's testimony.
4. Defense counsel has not had an opportunity to have tests performed to challenge the assumptions, studies, or tests upon which the physician's testimony is based.
5. Defense counsel may be simply caught off-guard at having to conduct cross-examination of the physician's trial testimony in a deposition he had intended for discovery purposes only.

Under the Missouri Rules of Civil Procedure, there is nothing to prevent plaintiff's counsel from preserving the testimony of plaintiff's treating physicians in a deposition noticed by defense counsel for purposes of discovering the physician's anticipated trial testimony. Rule 57.03 provides that a witness who has been noticed for deposition by one party may be examined by any other party on any subject so long as written notice of the party's intention to examine the witness is given to opposing counsel prior to or during the deposition.¹⁹ Defense counsel may not protect himself from such a "blind-side" by objecting to plaintiff's comprehensive cross-examination of the witness on the grounds that the testimony "exceeds the proper scope of cross-examination" since the scope of cross-examination in Missouri is limited only by the trial court's discretion.²⁰

Theoretically, a defendant who wishes to depose the plaintiff's treating physicians without risking that the physician's testimony will be preserved for trial by plaintiff's counsel through cross-examination may seek a protective order pursuant to Rule 56.01(c).²¹ Such an order could either prohibit plaintiff's counsel from cross-examining the witness in the same deposition²²

19. Mo. R. Civ. P. 57.03(b)(5) provides:

When the party causing a deposition or depositions to be taken under a notice shall have completed the taking thereof, any other party may, before the same or any other officer authorized to take depositions, and at the same place, proceed immediately, or on the next day, to take any depositions he may desire . . . ; but to do so, he shall, before or during the time of the taking of the depositions on behalf of the other party, give all other parties, or the attorneys representing them, notice in writing of his intention to do so

20. *See, e.g.*, *Krez v. Michel*, 431 S.W.2d 213, 215 (Mo. 1968); *Powell v. Norman Lines, Inc.*, 674 S.W.2d 191, 195-96 (Mo. Ct. App. 1984); *see also* *Bennett v. Strodtman*, 42 S.W.2d 43, 46 (Mo. Ct. App. 1931) (in a deposition, any question relevant to the subject matter is proper).

21. Mo. R. Civ. P. 56.01(c) provides:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense; including one or more of the following:

....

(2) that the discovery may be had only on specified terms and conditions, including a designation of time and place;

....

(4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters

22. *See* Mo. R. Civ. P. 56.01(c)(4).

or prohibit plaintiff's counsel from reading the deposition into evidence.²³ Unfortunately, it has been the authors' experience that Missouri circuit judges are unwilling to enter such orders since the Rules of Civil Procedure do not expressly forbid a party from using an opposing party's "discovery" deposition to preserve a witness's testimony for trial.

Now that *Woytus* prevents defense counsel from having equal access to plaintiff's treating physicians, defense counsel has the following options in deciding whether or not to take the deposition of the plaintiff's treating physicians and preparing for cross-examination in the event they are called by the plaintiff (either live or by deposition):

1. Base the decision solely on information contained in the treating physician's medical records and reports.
2. Ask plaintiff's counsel to agree to a joint interview of the treating physician.
3. Take a deposition of the treating physician, being careful not to qualify him as an expert or lay a foundation for the deposition being introduced into evidence and hoping that opposing counsel does not do so on cross-examination.

The first option, relying solely on the physician's medical records, is the option most often elected by defense counsel; however, it is inadequate for at least two reasons, particularly if the "treating physician" is, in fact, an advocate for the plaintiff who began seeing the plaintiff on referral from the plaintiff's attorney. First, the physicians' handwriting may be so illegible as to require a deposition or interview of the doctor just to decipher the doctor's office chart. Second, the physician's opinions relating to causation, prognosis, permanency, and extent of disability are unlikely to be contained in his office notes. These can be determined only by interview or deposition.

Clearly, defense counsel is at a distinct disadvantage if he must prepare for cross-examination of the plaintiff's treating physician without having first interviewed or deposed the witness, particularly since plaintiff's counsel can, and usually will, schedule an *ex parte* interview of the physician prior to the deposition pursuant to an authorization from his willing client.

The second option, a joint interview of the witness, is a potential solution to the problem created by *Woytus*; however, few plaintiffs' counsel will agree to a joint interview as long as *Woytus* is the law of the land. An attorney representing a personal injury plaintiff who willingly would consent to a joint interview, when he can interview the physician *ex parte* and shut out defense counsel, is not vigorously representing his client's interest. Obviously, the second option is not going to be available to defense counsel in very many cases.

23. See Mo. R. Civ. P. 56.01(c)(2).

The third option, a deposition of the physician without qualifying him as an expert or laying a foundation for the deposition being read into evidence trial, is fraught with peril since there is nothing to prevent plaintiff's counsel from qualifying the witness and eliciting his trial testimony on cross-examination. When that occurs, the only thing defendant accomplishes by taking the physician's deposition is getting to pay the witness's professional fee, an item of expense which otherwise would be borne by the plaintiff.²⁴

This dilemma potentially exists with respect to any expert witness; however, it is much more likely to arise with respect to the plaintiff's treating physicians since most expert witnesses who are specifically retained as experts will be brought into court to testify live. On the other hand, treating physicians, whether endorsed as experts or simply called to testify regarding their diagnosis and treatment of the plaintiff, are less likely to be asked to appear at trial. Instead, their testimony will be presented by deposition. This is due, in part, to the treating physician's need to remain in his office to care for his patients and, in part, to the unwillingness or inability of many physicians to juggle their schedules and make the other accommodations required for a live courtroom appearance. In addition, the Missouri Rules of Civil Procedure encourage the current Missouri practice of presenting most medical testimony by deposition rather than by an appearance at trial since the Rules permit a physician's deposition to be read into evidence without a showing that the physician is unavailable to appear at trial.²⁵ Nonetheless, because the problem described above may arise with respect to any expert witness, the solution proposed in this article for righting the wrong of *Woytus* covers non-physician as well as physician witnesses.

A change in the Missouri Rules of Civil Procedure is needed to resolve the problem presented by *Woytus*. Both counsel for plaintiffs and counsel for defendants must be allowed to depose an opposing party's expert witness without the witness being qualified as an expert and his testimony being preserved for use at trial by opposing counsel on cross-examination. Defense counsel, in particular, need to be able to depose the plaintiff's treating physicians to discover the substance of their opinions and conclusions without running the risk that plaintiff's counsel will qualify the witness as an expert and elicit his trial testimony on cross-examination. Nothing short of adoption

24. Mo. R. Civ. P. 56.01(b)(4)(b) provides that "[u]nless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for responding to discovery by deposition."

25. Mo. Sup. Ct. R. 57.07(a)(3) provides:

The deposition of any witness who is not present in court may be used by a party for any purpose if the court finds: . . . that the witness is . . . a practicing . . . physician and engaged in the discharge of his . . . professional duty at the time of trial.

of a new rule allowing depositions to be used for discovery purposes only will resolve this problem.

III. THE SOLUTION

The authors have discussed this dilemma with defense counsel from other parts of the country, and it appears that the problem is not as serious in many other states as it is in Missouri. This is because in most states, a physician's deposition may not be read into evidence without showing that the physician is unavailable to appear at trial by reason of death, infirmity or distance from his residence to the courthouse.²⁶ Consequently, in these states, most medical testimony is presented by bringing the physician into the courtroom to testify live. In Missouri, all that must be shown before a physician's deposition may be read into evidence is that his attention to his professional duties would preclude his appearing at trial.²⁷

In states where a physician must be shown to be unavailable before his deposition may be read into evidence, defense counsel may take a deposition of plaintiff's treating physicians with a fair degree of assurance that the deposition will not be read into evidence by opposing counsel at trial. In those states, if the physician's testimony is to be heard, the physician must be summoned to court to testify live unless he is unavailable. Thus, defense counsel has the means in those states, by way of deposition, to (1) discover the physician's opinions and conclusions in advance of the witness's testimony being preserved for or elicited at trial; (2) make an informed decision as to whether the physician ought to be called to testify as a witness for the defense; (3) anticipate whether the physician is likely to be called by the plaintiff at trial; and (4) prepare an effective cross-examination of the physician's anticipated trial testimony. Nonetheless, adoption of a more restrictive rule in Missouri regarding the reading of physician depositions into

26. Only twelve states, including Missouri, permit a physician's deposition to be read into evidence without a showing that the physician is unavailable to appear at trial by reason of death, infirmity, or distance from his residence to the courthouse. They are: Alabama, ALA. R. CIV. PROC. 32(a)(3)(D); Connecticut, CONN. R. SUPER. CT. § 248; Florida, FLA. R. CIV. PROC. 1.330; Illinois, ILL. SUP. CT. R. 212(b) (applies only to evidence depositions taken pursuant to the Illinois Rules of Civil Procedure); Kentucky, KY. R. CIV. PROC. 32.01(c)(vi); North Carolina, N.C. R. CIV. PROC. 32(a)(4) (applies only to video-taped depositions); Ohio, OHIO CIV. R. 32(3)(e); Oklahoma, OKLA. R. CIV. PROC. § 3232 (applies to all experts); Pennsylvania, PENN. R. CIV. PROC. 4017.1(g) (applies only to video-taped depositions); Virginia, VA. SUP. CT. R. 4:7(a)(4) (applies only if the physician "in the regular course of his profession, treated or examined any party to the proceeding"); and Wisconsin, WIS. R. CIV. PROC. 804.07(1)(c).

27. Mo. Sup. Ct. R. 57.07(a)(3)(C).

evidence is *not* the solution to the dilemma presented by *Woytus*. Instead, the Missouri Supreme Court should consider adoption of a rule which provides for the taking of "discovery" depositions; that is, depositions taken for purposes of discovery which may *not* be used at trial except for impeachment.

Several states, including neighboring Illinois, already have "discovery" depositions.²⁸ Illinois Supreme Court Rule 202, which provides for both "evidence" depositions and "discovery" depositions, would provide a good model for Missouri if this state were to adopt a rule allowing "discovery" depositions.

In Illinois, an "evidence" deposition may be introduced into evidence at trial and used for any purpose on a showing of the witness' unavailability.²⁹ Furthermore, an "evidence" deposition of a physician or surgeon may be admitted into evidence regardless of the witness's availability.³⁰ "Discovery" depositions, on the other hand, may be used only for impeachment, as an admission of a party, or as evidence of a fact if it falls within an exception to the hearsay rule.³¹ Subject to these few exceptions, "discovery" depositions may not be introduced into evidence even though the witness is unavailable.³² In other words, discovery depositions have basically the same evidentiary status as an *ex parte* statement.

Illinois does not permit defense counsel to conduct *ex parte* interviews of a personal injury plaintiff's treating physicians;³³ however, the problems presented by *Woytus* do not exist in Illinois because of the Illinois rule permitting "discovery" depositions. In Illinois, defense counsel may take a "discovery" deposition of a personal injury plaintiff's treating physicians pursuant to Rule 202 without being concerned that plaintiff's counsel will qualify him as an expert and elicit his trial testimony on cross-examination. If a party wishes to take a deposition to be read into evidence, they must notice and take a separate "evidence" deposition.

The Illinois rule permitting "discovery" depositions enables defense counsel in Illinois to evaluate the testimony of plaintiff's treating physicians in advance of trial, to determine whether or not to call them to testify at trial

28. See Ill. Sup. Ct. R. 202. The other states which provide for depositions which may be used for discovery purposes only are: California, CALIF. CODE CIV. P. § 2025(d)(6), (i)(3); Maryland, M. CODE CIV. P. § 2-416(b); New Jersey, N.J. R. CIV. P. 4:14-9; Oregon, OR. R. CIV. P. 39(1); Rhode Island, R.I. R. CIV. P. 26(d)(3), 30(b)(2); and Tennessee, TENN. R. CIV. P. 26.02(4), 32.01(3).

29. Ill. Sup. Ct. R. 212(b).

30. *Id.*

31. Ill. Sup. Ct. R. 212(a).

32. *Id.*

33. See *Petrillo v. Syntex Laboratories, Inc.*, 148 Ill. App. 3d 581, 588, 499 N.E.2d 952, 959 (1986).

(either by a separate "evidence" deposition or by bringing them into the courtroom to testify live) and to prepare to cross-examine them if they are called by opposing counsel. Thus, in Illinois, defense counsel is on a more equal footing with plaintiff's counsel in preparing the medical aspects of a personal injury case for trial. A similar rule is needed in Missouri to correct the inequities presented by *Woytus*.

IV. CONCLUSION

The Missouri Supreme Court's decision in *Woytus* disallowing *ex parte* interviews by defense counsel of a personal injury plaintiff's treating physicians places defense counsel at a disadvantage in preparing the medical aspects of a personal injury case for trial, particularly since plaintiff's counsel still has the ability to conduct such interviews. Missouri needs to adopt a rule permitting the taking of "discovery" depositions to remedy the inequities presented by the *Woytus* decision and to put defense counsel on a more equal footing with plaintiff's counsel in preparing personal injury cases for trial.